United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

76-7586

United States Court of Appeals

For the Second Circuit

B

P/S

RED STAR TOWING AND TRANSPORTATION COMPANY,

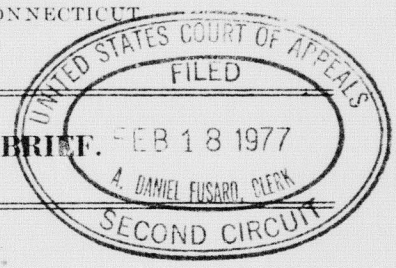
Plaintiff-Appellant,

against

STATE OF CONNECTICUT and SAMUEL KANELL, Commissioner of Transportation of the State of Connecticut,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT



APPELLEES' BRIEF.

DION W. MOORE, Esq.
PULLMAN, COMLEY, BRADLEY & REEVES
Attorneys for Appellees
855 Main Street
Bridgeport, Connecticut 06604
(203) 334-0112

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

Table of Contents.

TABLE OF CASES.

Page

Page

STATUTES:

CONSTITUTIONAL PROVISIONS:

United States Court of Appeals

FOR THE SECOND CIRCUIT.

RED STAR TOWING AND TRANSPORTATION COMPANY,

Plaintiff-Appellant,

against

STATE OF CONNECTICUT and SAMUEL KANELL, Commissioner of Transportation of the State of Connecticut,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

APPELLEES' BRIEF.

Statement of Issues.

The issue presented in this case is whether the State of Connecticut waived sovereign immunity under the Eleventh Amendment of the United States Constitution by its construction and operation of a bridge over navigable waters. Two pivotal, subordinate issues are whether the Bridge Act of 1906 (Title 33 U.S.C. §491 *et seq.*) permits a claim by a private party for violation of the Act's standards and whether or not it was the intent of Congress to abrogate a State's sovereign immunity in the enactment of the Bridge Act.

Statement of Case.

This complaint, filed on November 14, 1975, claims property damage to the tug "Ocean King" caused by its collision with the Tomlinson Bridge—alleged and admitted to be owned, operated and maintained by the State

of Connecticut (9a).[1] The defendants moved to dismiss the complaint on the grounds that the Court had no jurisdiction over the subject matter of the action or the persons of the defendants by virtue of the doctrine of sovereign immunity (13a). The motion was heard by the Honorable Robert C. Zampano who filed his memorandum of decision on October 26, 1976, granting the defendants' motion "since plaintiff is precluded by the Eleventh Amendment from suing defendants in this Court. . . ." *Red Star Towing and Trans. Co. v. State of Connecticut,* Civil Action No. B 75-360 (D. Conn., 1976) (3a-7a).

The instant appeal followed.

Introduction.

The Third, Fifth and Seventh Circuits have each concluded that sovereign immunity is not waived by a State's operation of a bridge over navigable waters. See: *Red Star Towing and Transportation Co. v. Department of Transportation of New Jersey,* 423 F. 2d 104 (3rd Cir. 1970); *Intracoastal Transp., Inc. v. Decatur County, Georgia,* 482 F. 2d 361 (5th Cir. 1973); and *Williamson Towing Co., Inc. v. State of Ill.,* 534 F. 2d 758 (7th Cir. 1976). A contrary result has been reached by the Fourth Circuit in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen,* 404 F. 2d 1001 (4th Cir. 1968), holding that the erection of a bridge over navigable waters required the surrender of sovereignty and submission to the "paramount overlord of the United States." These cases are reviewed below in conjunction with the relevant Supreme Court cases which have come down since the holding in the *Lauritzen* case. No attempt will be made herein, however, to merely reiterate the argument made in *Red Star Towing and Transportation Co., Intracoastal Transp., Inc.* or *Williamson Towing Co.* cited above.

---

[1]The designation "_____A" refers to the applicable page of the Joint Appendix.

ARGUMENT.

POINT I.

The viability of the Eleventh Amendment.

The historical genesis of the Eleventh Amendment arose out of an angry reaction to *Chisholm v. Georgia,* 2 Dall 419 (1793), which prompted ratification with "vehement speed." *Larson v. Domestic and Foreign Corp.,* 337 U. S. 682, 708 (1949). The amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . ." In sum, the amendment preserves for the states the traditional concepts of sovereign immunity, and, while often criticized (and sometimes unrecognized), it serves today as a firm principle of federalism.

It would not appear necessary to defend the Eleventh Amendment despite the criticism leveled at it. Although referred to as an "archaic hangover not consonant with modern morality" it survives today with as much if not greater force, and for the same reasons quoted in *Fitts v. McGhee,* 172 U. S. 516, 528 (1899):

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming or convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to the complaints of private persons, whether citizens of other states or aliens, or that the costs of their

> public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent and in favor of individual interests."

The same rationale was noted by the court in *Larson v. Domestic and Foreign Corp., supra,* when it wrote that in absence of a claim of constitutional limitation, governmental functions should be carried out unhampered by judicial intervention. The possible detrimental effect on the myriad of governmental functions now performed by the states absent sovereign immunity was also the concern of *Employees v. Missouri Public Health Department,* 411 U. S. 279 (1973). The particular Congressional act under consideration in that case (29 U. S. C. §216[b]) allowed for liquidated damages and attorneys' fees. The majority noted, however, that it was reluctant to assume that Congress intended the states to be treated so harshly and refused to discard the defense of sovereign immunity. Finally, the capstone to the Eleventh Amendment defense was set forth in *Edelman v. Jordan,* 415 U. S. 651 (1974), when it wrote that it is now a rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment." *Edelman v. Jordan, supra,* at page 663.

This rule is applicable even though the immunity defense would deprive a private party of a remedy. As noted in *Green v. State of Utah,* 539 F. 2d 1266 (1976), involving a state's issuance of securities in violation of the securities laws, the court wrote:

> "Appellant argues the immunity defense will in effect deny a forum to prosecute this cause of action against the state. See: 15 U. S. C. §78J. This argument cannot be altogether minimized, but it

> alone does not constitute a sufficient basis to determine that Congress intended to deprive the state of its historic immunity. As one court said, 'The apparent hardships resulting from the adoption and retention of the doctrine's intended operation • • • have long been subordinated.' *Mackethan v. Commonwealth of Virginia,* 370 F. Sup. 1 (E. D. Va. 1974), affd. 508 F. 2d 838, cert. dend. 422 U. S. 1045 (1975)."

The same concerns of the existence of a right without a remedy were expressed in the majority opinion of the *Parden* case and the dissent in *Intracoastal Transp., Inc.* However, in the present case the plaintiff had the option of initiating an action against the state under Section 13a-144 of the Connecticut General Statutes. That statute provides for a limited waiver of immunity allowing suits for damages to persons injured by virtue of a defective bridge. Likewise, the plaintiff could have proceeded under Section 4-141, *et seq.* of the Connecticut General Statutes which provides that consent to sue the state may be obtained through the Commission on Claims. As such, there were clearly adequate remedies for the plaintiff to pursue in the state court, and plaintiff's reference to the contrary at page 7 in its brief shows an ignorance or misunderstanding with regard to the existing law in the State of Connecticut.

The only exceptions to the immunity rule set forth in *Edelman v. Jordan, supra,* are to be found in the concepts of consent or waiver. For example, sovereign immunity and its corollary, the Eleventh Amendment, may be expressly waived as with a "sue and be sued provision." *Petty v. Tennessee-Missouri Bridge Commission,* 359 U. S. 275 (1959). Likewise, it may be waived by the express consent of the state to be sued such as that set forth by state statutes [e. g. Conn. Gen. Stat. §13a-144] or where authorization to sue the state is given by a

Claim Commissioner [e. g. Conn. Gen. Stat. §4-160]. Finally, immunity may be waived by implication such as where the state enters into a proprietary field in an area of federal control. *Parden v. Terminal Railway of Alabama Dock Dept.*, 377 U. S. 184 (1964).

Parden involved the right to sue the state under FELA by one injured by a railroad operated by the state in a proprietary capacity. The court wrote:

> "A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."

The effect of the *Parden* case and waiver by implication are discussed in greater detail below.

POINT II.

It was not the intent of Congress to abrogate a state's sovereign immunity in enactment of the Bridge Act of 1906.

While there may at one time have been some doubt as to the elements required to be found in a waiver of sovereign immunity or Eleventh Amendment rights, that is no longer the case. Waiver will be found by implication only where (1) there is an entry into the area subject to federal regulation (2) there is express language in the federal regulatory scheme which shows a clear intent that sovereign immunity be abrogated and (3) the federal statute creates a private cause of action for the class of plaintiff initiating the action. *Williamson Towing Co., Inc. v. State of Ill., supra.*

There is no question but that the ownership and operation of the Tomlinson River Bridge over navigable waters is within the sphere of federal regulation. However, as is indicated in the opinion of the court below, there is no indication in the Bridge Act of 1906 of any intent by Congress to permit individuals to sue a state in the federal court for violations of the Act.

Title 33 U. S. C. §494 provides that no bridge shall be erected or maintained which shall at any time unreasonably obstruct navigation. Drawbridges, under the Act, are to be opened promptly upon signal, and lights and other signals are to be maintained upon such bridge as the Coast Guard proscribes. Failure to comply with these provisions can result in a fine not to exceed $5,000 which liability may arise anew each month. The refusal of a person owning or controlling such bridge to comply with lawful orders issued by the Secretary of the Army or Chief of Engineers may result in the removal of the bridge at the expense of the owner. Title 33 U. S. C. §495. Proceedings for enforcement of the Act's directives are under the direction of the Attorney General of the United States. Persons as defined in the Act include municipalities, quasi-municipal corporations, corporations, companies and associations. Title 33 U. S. C. §497. *Williamson Towing Co., Inc. v. State of Illinois, supra,* at footnote 4.

Edelman v. Jordan now makes it clear that there must either be express language in the statute that it be applicable to sovereign states or, if absent, that the implication of waiver be overwhelming. This case involved an award of retroactive benefits under a federal program of aid to the aged, blind and disabled. The court wrote:

> "In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by

> the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'"

So also in *Employees v. Missouri Public Health Dept., supra,* which involved a suit to recover overtime compensation under the Fair Labor Standards Act and liquidated damages, the court distinguishing *Parden* as a case limited to its facts and involving an operation for profit, wrote:

> "The Parden opinion did state that it would be 'surprising' to learn that Congress made state railroads liable to employees under FELA, yet provided 'no means by which that liability may be enforced.' 377 U. S. at p. 197, 12 L. Ed. 2d 233. It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old §16 (b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away."

As applied to the facts in the instant case, the court in *Intracoastal Transp., Inc. v. Decatur County, Georgia, supra,* found that the *Employees v. Missouri Public Health Dept.* case required that a "private litigant must show that Congress expressly provided that the private remedy is applicable to the states." Nothing in the Act supports any theory that it lifted the "skirts" of a state's immunity and, indeed, sovereign states are significantly excluded from the definition of persons. Title 33 U. S. C. §497.

In sum, and as noted in both *Williamson Towing Co., Inc.* and *Intracoastal Transp., Inc.*, the Act "is penal in nature and enforcement of its provisions is vested in the Attorney General."

POINT III.

The Bridge Act of 1906 did not create a private federal remedy.

In addition to the requirement that Congress expressly abrogate sovereign immunity in its statutory scheme, it must also have vested in the plaintiff the right to a claim for relief. Federal regulation does not in and of itself create any concomitant private rights. In *Cort v. Ash,* 422 U. S. 66, 78 (1975), the court wrote:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Like §407 of the Rivers and Harbors Appropriation Act of 1899, the Bridge Act of 1906 was passed for the special benefit of the public at large, not any particular private individual. Cf. *Parsell v. Shell Oil Company,* 421 F. Supp. 1275 (1976). So also as noted above, the Act on its face is wholly penal in nature and enforcement of its provisions is vested in the Attorney General. *Williamson Towing Co., Inc. v. State of Ill., supra,* at page 762. As such, there is no legislative intent to create a private remedy nor would such a remedy be consonant with the underlying purpose of the statutory

scheme. Again, in the context of the Rivers and Harbors Appropriation Act, Judge Newman wrote:

> "This statutory scheme evinces an *intent to lodge enforcement responsibility solely in the Department of Justice,* which can make discretionary prosecutorial decisions taking into account the effects of other federal water quality legislation. Congress has not authorized 'private attorneys-general' to enforce this section. For this reason every court which has considered the question has denied to private plaintiffs the right to bring an action under the Act to recover in a *qui tam* action the percentage of the fine which they might have been entitled to receive as informers if an offense had been prosecuted to conviction. Our circuit has taken this position in *Connecticut Action Now, Inc., v. Roberts Plating Co., supra,* stating: 'It is hard to look at [the statutory] pattern except as a mandate that the Federal Government is to be the initiator of the proceeding.'" 457 F. 2d at 85.

Finally, while the facts of this case involve a collision between tug and bridge there is no reason to infer a cause of action based solely on federal law. State law provides a remedy, and, although within admiralty jurisdiction, the control of intrastate traffic on a state's roads and rivers is basically a state concern.

POINT IV.

Lauritzen and the "mere entry" cases.

Parden v. Terminal Railway of Alabama Dock Department, 377 U. S. 184 (1964), has made it all too easy to write that a "state has waived its sovereign immunity • • • by voluntarily entering a field under federal regulation. E.g., *Forman v. Community Services, Inc.,* 500 F.

2d 1246 (2nd Cir. 1974), rev'd. 421 U. S. 837 (1975). However, it is now clear that mere entry into the field is not, in and of itself, sufficient to imply a waiver of immunity.

Chesapeake Bay Bridge v. Lauritzen, supra, cannot be considered persuasive in view of subsequent Supreme Court cases requiring (1) that a private cause of action be created and (2) that Congress expressly provide that such remedy be applicable to the states. The *Lauritzen* case considered neither of these criteria concluding that mere entry would suffice. As such, its holding was based upon insufficient criteria.

On the other hand, the Fifth and Seventh Circuits, with the benefit of subsequent Supreme Court cases properly found, as did the court below, that there was no implied waiver of sovereign immunity by virtue of a State's operation of a bridge over navigable waters as the Bridge Act of 1906 did not expressly abrogate such immunity and no private right of action was created by the passage of the Act.

Conclusion.

For the foregoing reasons, it is respectfully requested that the judgment of the court below dismissing the action be affirmed.

DION W. MOORE,
PULLMAN, COMLEY, BRADLEY & REEVES,
855 Main Street,
Bridgeport, Connecticut,
Attorneys for Appellees.

Service of three (3) copies of
the within Brief is
hereby admitted this 18th day
of February, 1977

McHugh Hackman Smith Howard
Attorney for Plaintiff-Appellant
BY: Robert J. McHugh